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**MAR 16 1993**

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

March 16, 1993

Donna R. Searcy, Secretary  
Federal Communications Commission  
1919 M Street, N.W.--Room 222  
Washington, D.C. 20554

**ORIGINAL**

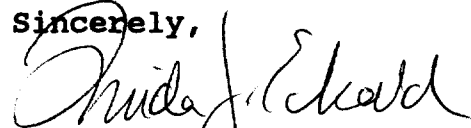
Re: MM Docket No. 92-317  
Milford, Iowa

Dear Ms. Searcy:

Enclosed for filing are an original and six copies of an Opposition to Motion to Enlarge Issues filed by Milford Broadcasting Company. Attached to the Motion as Exhibit 1 is an affidavit of Mr. Kevin Galbraith. The affidavit is signed by Mr. Galbraith and his signature has been attested to by a notary. However, only a copy of the affidavit is being filed today. The original affidavit will be filed as a supplement upon its arrival in Washington, D.C.

If there are any questions concerning this matter, please contact the undersigned counsel to Milford Broadcasting Company.

Sincerely,

  
Linda J. Eckard

cc: Hon. Edward Luton  
Paulette Laden, Esq.  
Richard F. Swift, Esq.

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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

**RECEIVED**  
**MAR 16 1993**  
FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In re Applications of

MILFORD BROADCASTING CO.

SHARON A. MAYER

For Construction Permit for a New  
FM Station on Channel 271C2  
in Milford, Iowa

) MM Docket No. 92-317

) File No. BPH-911003MI

) File No. BPH-911004MG

To: Honorable Edward Luton  
Administrative Law Judge

**OPPOSITION TO MOTION TO ENLARGE ISSUES**

Milford Broadcasting Company (hereinafter "MBC") hereby opposes the Motion to Enlarge Issues filed by Sharon A. Mayer (hereinafter "Mayer") on March 1, 1993.<sup>1</sup> The Motion should be summarily denied as it will burden this proceeding with an inquiry into issues that are without merit, will have no decisional significance, and thus will have no bearing on MBC's basic qualifications to be a Commission licensee. In support of its opposition, MBC states as follows:

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<sup>1</sup> This opposition is timely filed pursuant to Section 1.294(c), which requires that oppositions to motions to enlarge issues be filed within 10 days of the filing of the motion, and Section 1.4 which permits an additional three days in which to file an opposition if the motion is served by mail.

1. Mayer seeks to enlarge the issues in this proceeding to determine whether MBC complied with Commission Rules and made certain statements during a settlement meeting between principals. Essentially, Mayer is asking that it be permitted to explore MBC's character, but only on a comparative basis. Adding the issues would be inconsistent with the Commission's decision years ago to exclude consideration of an applicant's character from the comparative analysis. Character Qualifications, 102 FCC 2d 1179, 1230 (1986). The Commission based its decision on two important facts. First, that too much time was spent "adjudicating an applicant's minor transgressions which have very little bearing on its ability to act as a responsible broadcaster" and that such an evaluation "increases the cost, complexity, length and subjectivity of these proceedings without a sufficient benefit." Id., at 1231 and 1232. And, second, that in comparative proceedings, "the character issues specified seldom prove to have decisional significance." Id. The issues sought by Mayer are precisely the type that the Commission intended to eliminate from consideration, and on that basis alone, the Motion may be denied. Nevertheless, MBC will respond to the allegations made by Mayer, and based upon all of the facts, it is clear that the issues should not be added.

**MBC HAS COMPLIED WITH THE INTENT AND SPIRIT OF THE COMMISSION'S  
RULES CONCERNING THE MAINTENANCE OF ITS PUBLIC FILE**

2. Mayer seeks to add an issue in this proceeding to determine if MBC has maintained its public file in accordance with

the Commissions's Rules. The sole basis for Mayer's request is that MBC's public file was unavailable ~~once~~ several months after the application was filed, local notice published, and the public file established. MBC does not dispute Mayer's claim that the public file was not available to her on this one solitary occasion. However, MBC challenges Mayer's conclusion that an innocent mistake should be the basis for probing MBC'S comparative qualifications.

3. The Commission's Rules require that an applicant for a new construction permit publish notice of the filing of its application and include the location of the applicant's public file in that notice. MBC diligently followed those rules by publishing the requisite notice and alerting the public to the location of MBC's public file at Northwest Federal Savings Bank in Milford, Iowa (hereinafter the "Bank"). (See Exhibit 1, Affidavit of Kevin Galbraith.)

4. MBC made arrangements with Gloria Fitzpatrick, the Branch Manager of the Bank, to maintain the public file at that location and delivered the public file to her under cover of a letter from Mr. Galbraith dated October 10, 1991. (See Exhibit 1.)

5. In late December 1991, Mr. Galbraith was visiting family who reside in Milford and, while there, decided to meet Mrs. Fitzpatrick. When he arrived at the Bank he asked for Mrs. Fitzpatrick and met with a woman whom he believes was Mrs. Fitzpatrick. However, when Mr. Galbraith spoke to Mrs. Fitzpatrick

on March 12, 1993, to confirm their meeting in December 1991, she told Mr. Galbraith that she does not specifically remember meeting him. However, Mrs. Fitzpatrick does not deny that the meeting took place, only that she cannot recall it now some 15 months later. Therefore, although Mr. Galbraith thinks that he met with and received the public file from Mrs. Fitzpatrick in December 1991, it is possible that he met with another representative of the Bank. (See Exhibit 1.)

6. In his affidavit, Mr. Galbraith explains that during the meeting at the Bank, the woman with whom he met retrieved the public file from a drawer in her desk and handed the file to him. He knew that publication of the notice announcing the filing and location of the application had been completed about two months earlier and assumed that there was a period for reviewing the file which coincided with the publication of that notice. Therefore, he did not question the file being returned to him, rather he assumed the period for review had expired and accepted the file. (See Exhibit 1.)

7. MBC filed an amendment to its application with the Commission on Friday, February 28, 1992. In the course of preparing that amendment, Mr. Galbraith learned for the first time that the file should not have been removed and needed to be returned. Mr. Galbraith contacted the Bank at once to confirm that it would continue to permit the file to be maintained there and sent the public file to the Bank. (See Exhibit 1.) This is

consistent with Mrs. Fitzpatrick's recollection that the file arrived unsolicited at her office during the week of March 1, 1992. (See Motion, Affidavit of Mrs. Fitzpatrick). Thus, while a principal of MBC inadvertently removed the file, that same principal voluntarily cured the error without being requested to by the Commission, the public or any party to this proceeding.

8. Mayer alleges that the unavailability of the public file is sufficient cause to commence an inquiry. However, the facts do not support the need to burden this proceeding.

9. While Mayer emphasizes the unavailability of MBC's public file during a two month period, there was in fact, no harm to the public caused by the inaccessibility of the file. As indicated by the log maintained by the Bank of those asking to review the public file, no member of the public attempted to review MBC's file between the date it was inadvertently removed from the Bank and March 3, 1992. (See Exhibit 2.) Certainly, Mayer cannot argue that the public was harmed if no member of the public sought to review the file during the period it was not available.<sup>2</sup>

10. Nor can Ms. Mayer argue that she was in any way harmed by the brief absence of the file. Mayer's own statements show that the file was unavailable for, at most, three business days. In her

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<sup>2</sup> Mr. Galbraith states that neither Mrs. Fitzpatrick nor any other representative of the Bank contacted him to say that there were any unfulfilled requests to review the file. (See Exhibit 1.)

supporting declaration, Ms. Mayer states that she attempted to review MBC's public file on March 3, 1992, a Tuesday. Presumably Ms. Mayer sought to determine if MBC had filed an amendment during the amendment of right period. MBC filed an amendment on Friday, February 28, 1992, the last day for filing such amendments, which was only two business days prior to Ms. Mayer's visit to the Bank. Thus, even if the file had been at the Bank on March 3, it is unlikely that the February 28 amendment would have been in the file even though it was sent to the Bank immediately after it was filed. Moreover, Mrs. Fitzpatrick recalls that she received the public file during the week of March 1. Thus, at the latest, the file arrived at the Bank by Friday, March 6, three days after Ms. Mayer attempted to review it.

11. The facts are simple and not in dispute. MBC established a public file and properly notified the public of its location. Due to an inadvertent error, the public file was temporarily unavailable but it was returned by MBC upon discovering that the file should have remained at the Bank. No member of the public attempted to review the public file during the period it was not available. Only Ms. Mayer, a party in this proceeding, attempted to review the file, it was unavailable for at most three days and even if it had been available most likely would have contained only those portions of the application that were available to Ms. Mayer when she reviewed the file on October 17, 1991. (See Exhibit 2.)

12. Ample precedent supports a conclusion that the requested issue should not be added in this proceeding. In KOWL, Inc., 31 RR 2d 1589 (Rev. Bd. 1974), the Board refused to add an issue where an individual attempted three times to review the public file at the address designated by the applicant, but no one was at that address. The applicant eventually contacted the person and made the file available to him. The Board concluded that no purpose would be served where the absence of the file was a "technical violation", it was not serious enough to be decisionally significant, there was no intent to conceal the contents of the file, and no prejudice to the public or other parties had been demonstrated. See also FM 103, Inc., 38 RR 2d 1633 (ALJ 1976) (issue not added where applicant located public file outside proposed community of license but took corrective action upon discovering the error and no prejudice shown) and Rust Communications Group, Inc., 36 RR 2d 47 (Rev. Bd. 1976) (issue not added where omission of documents from the public file was promptly remedied as the violation was technical and no prejudice had been alleged or demonstrated). Like these other applicants, MBC committed an inadvertent, technical violation of the rules, MBC on its own discovered and cured the problem, and neither the public nor any party was prejudiced by the error.

MAYER'S REQUEST FOR AN ABUSE OF PROCESS ISSUE LACKS A  
PROPER FACTUAL AND LEGAL BASIS

13. Mayer has leveled a serious charge against MBC, alleging that Mr. Galbraith, a principal of MBC, attempted to intimidate Ms.



Mayer. MBC affirmatively denies the charge and thus, there is no factual basis for adding the issue. However, even giving Ms. Mayer the benefit of the doubt as to her recollection of what happened, there is no sound legal basis for adding the issue.

14. As Ms. Mayer's own declaration attests, she agreed to meet Mr. Galbraith, a principal of MBC, who was then serving as its President, to discuss the applications and the possibility of settlement. They scheduled a meeting for December 30, 1991. (See Motion, Declaration of Sharon Mayer). Ms. Mayer claims that toward the end of the conversation, Mr. Galbraith told her "he already had the FBI checking me out." (Id.) Mr. Galbraith, who has reviewed Ms. Mayer's declaration, denies that he made such a statement to Ms. Mayer. He has no connection to the FBI and has no knowledge of a private citizen's ability to initiate such an investigation. (See Exhibit 1.)

15. Mr. Galbraith confirms that they discussed the comparative hearing process including the fact that applicants are permitted to investigate each other's proposals and qualifications as part of the process. Like Ms. Mayer, Mr. Galbraith has never been involved in a comparative proceeding. (See Exhibit 1.) Ms. Mayer states that she perceived this statement as an attempt to intimidate her. However, Mr. Galbraith merely recited what he understood the Commission allows competing applicants to do; investigate a competitor's qualifications.

16. Even assuming that the alleged statement was made using the words recalled by Ms. Mayer, it most certainly does not constitute a statement that requires Commission inquiry. First, and most important, no such investigation by the FBI actually occurred and Mayer has not alleged otherwise. Second, it would constitute one isolated statement that she has not alleged resulted in any harm to her or adversely affected her position in this proceeding.

17. The cases cited by Mayer do not support the addition of the requested issues. In each case, an issue was added because the applicant involved made flagrant and repeated attempts to intimidate, harass and investigate its opponent. In Town and Country Radio, Inc., 33 RR 2d 671 (Rev. Bd. 1975), agents of the applicant had actual police officers question a person who was reviewing the public file. Those officers asked the person for identification, told him that his license plate number would be checked against police records, asked to take his picture and copy his notes concerning the public file and told him that they would be checking FBI files. See also WIOO, Inc., 28 RR 2d 685 (Rev. Bd. 1973) (opponent made repeated attempts to undermine applicant's site availability and financial qualifications by contacting the site owner and investors).

18. Mayer has not alleged that MBC or Mr. Galbraith took any action whatsoever to initiate an investigation by the FBI. And, while Ms. Mayer may have mistakenly perceived that Mr. Galbraith

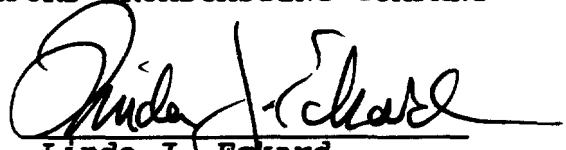
was attempting to intimidate her, the fact is that an investigation of one's opponent in a comparative proceeding is permissible. It is well accepted by the Commission that "an applicant has the right to investigate the credentials of its adversary. By voluntarily placing themselves in an adversarial posture, the principals expose themselves to a reasonable and proper search of their credentials." Andromeda Broadcasting System, Inc., 42 RR 2d 1323, 1327 (ALJ 1978). The mere fact that Mayer charges that Mr. Galbraith's conduct constituted a threat or harassment does not make it so. Id., at 1331. See also Chapman Radio and Television Co., 37 RR 2d 735 (Rev. Bd. 1976) (motion to enlarge denied where opponent pursued inquiries with bank concerning competitor's bank loan commitment).

FOR THE FOREGOING REASONS, Mayer's Motion to Enlarge Issues should be DENIED and this proceeding should not be enlarged to add the issues requested by Mayer.

Respectfully submitted,

MILFORD BROADCASTING COMPANY

By:

  
Linda J. Eckard  
Pamela C. Cooper

Roberts & Eckard, P.C.  
1919 Pennsylvania Ave.  
Washington, D.C. 20006  
Its Counsel

**EXHIBIT 1**

**AFFIDAVIT**

**COMMONWEALTH OF PENNSYLVANIA**

**COUNTY OF CHESTER**

I, Kevin Galbraith, being duly sworn, heraby states as follows:

1. I am a stockholder in Milford Broadcasting Company ("MBC"), an applicant for a new FM station to serve Milford, Iowa. I have read the Motion to Enlarge Issues filed by Sharon Mayer on March 1, 1993.

2. Ms. Mayer seeks to add an issue to determine whether MBC has complied with the FCC's rules concerning the maintenance of its public file. My recollection of the facts surrounding the location of the public file is as follows. Immediately after MBC filed its application, I contacted the Northwest Federal Savings Bank in Milford, Iowa, by telephone and spoke to Mrs. Fitzpatrick, the Branch Manager, to ask if the Bank would allow MBC to locate its public file there. She said that the Bank would be willing to maintain the file. By letter dated October 10, 1991, addressed to Mrs. Fitzpatrick I sent the public file to the Bank. Notice of the filing of the application was published in the Milford Mail on October 17, 24, and 31, 1991.

3. In December 1991 I was visiting my family during the Christmas holidays. I called the Bank and said that I would stop by to meet with Mrs. Fitzpatrick. When I arrived at the Bank I asked for Mrs. Fitzpatrick and believe that she is the woman with whom I met. However, I spoke to Mrs. Fitzpatrick on March 12, 1993, and learned that she does not specifically recall our meeting over 15 months ago. She did not deny that the meeting took place, only that she cannot now recall it. Therefore, although I think that Mrs. Fitzpatrick is the person with whom I met on that particular day in December 1991, it is possible that it was another representative of the Bank.

4. During my December 1991 meeting, the Bank representative with whom I met retrieved the public file from a drawer in her desk and handed the file to me. I knew that publication of the notice announcing the filing and location of the application had been completed about two months earlier and

thought that there was a period for reviewing the file which coincided with the publication of that notice. Therefore, I did not question the file being returned to me as I assumed that the period for reviewing the file had expired.

5. The issue of the availability of the public file did not arise until late February 1992 when NBC was preparing an amendment to its application. I learned then that a copy of the amendment would have to be placed in the public file. For the first time I learned that the file should not have been removed. I recall contacting the Bank at once to say that the file would have to be returned and to confirm that the Bank remained willing to maintain the file. My recollection is that I returned the file to the Bank immediately after the amendment was filed. From the time the file was established to the time that it was returned to the Bank, neither Mrs. Fitzpatrick nor any other representative of the Bank contacted me to tell me that anyone had been inquiring about the file.

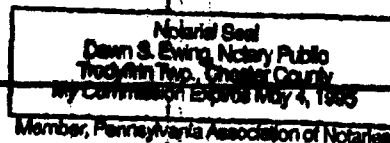
6. During that same visit to see my family in December 1991, I contacted Ms. Mayer to find out if she would be willing to meet with me. I had never met Ms. Mayer before and thought it might be useful to discuss our applications and find out if there was a possibility of settling the proceeding. We discussed the FCC's hearing process, a process that is new to me. In the course of our meeting, we discussed the fact that each applicant's proposals and qualifications is subject to inquiry and investigation by the other. Ms. Mayer informed me that she understood that this was part of the process. I did not make any statement whatsoever concerning an investigation of Ms. Mayer by the FBI or anyone else and have made no attempts to initiate any such investigation. I am not associated with the FBI, have no contacts with that agency, and have no knowledge of a private citizen's ability to request that another private citizen be investigated.

  
Kevin Galbraith

Subscribed and sworn to before me this 16<sup>th</sup> day of March, 1993.

  
Notary Public

My Commission expires



**EXHIBIT 2**



NAME	ADDRESS	DATE
1. Sharon Mayer	P.O. Box 266 Milford, Ia.	10-17-91
2. <i>[Signature]</i>	Rt 2 Box 317 <sup>W</sup> Wasson Springs	10/18/91
3. Sharon Mayer	P.O. Box 266 Milford, Ia.	3-3-92
4. Susan Reiser	Milford Mail	2-9-93
5. Sharon Mayer		2-8-93
6. Sharon Mayer		2-16-93
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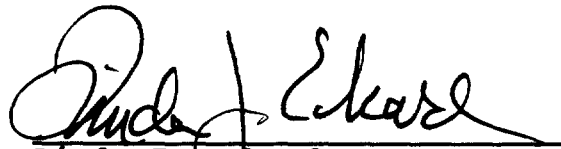
CERTIFICATE OF SERVICE

I, Linda J. Eckard, an attorney with the law firm of Roberts & Eckard, P.C., hereby certify that I have sent a copy of the foregoing OPPOSITION TO MOTION TO ENLARGE ISSUES by first class U.S. mail, postage prepaid, on this 16th day of March, 1993, to the following:

\*Honorable Edward Luton  
Administrative Law Judge  
Federal Communications Commission  
2000 L Street, Second Floor  
Stop Code 0900  
Washington, DC 20554

\*Paulette Laden, Esq.  
Hearing Branch, Enforcement Division  
Mass Media Bureau  
Federal Communications Commission  
2025 M Street, N.W., Room 7212  
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Washington, DC 20036  
Counsel for Sharon A. Mayer

  
Linda J. Eckard

\* By Hand Delivery